

9-23.000

WITNESS IMMUNITY

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9-23.100 Witness Immunity -- Generally

This chapter contains the Department's policy and procedures for seeking "use immunity" under Title 18 U.S.C. §§ 6001-6005. Sections 6001 to 6005 provide a mechanism by which the government may apply to the court for an order granting a witness limited immunity in all judicial, administrative, and congressional proceedings when the witness asserts his or her privilege against self-incrimination under the Fifth Amendment. (Section 6003 covers court and grand jury proceedings, Section 6004 covers administrative hearings, and Section 6005 covers congressional proceedings.)

See the Criminal Resource Manual at 716 through 719, for an overview of the differences between the various types of immunity, including use immunity, derivative use immunity, transactional immunity and informal immunity.

NOTE: Although Title 21 of the United States Code contains similar immunity provisions to those contained in Title 18, the Department of Justice utilizes only those provisions contained in Title 18.

9-23.110 Statutory Authority to Compel Testimony

Section 6003 of Title 18, United States Code, empowers a United States Attorney, after obtaining the approval of the Attorney General, the Deputy Attorney General, the Associate Attorney General, or any designated Assistant Attorney General or Deputy Assistant Attorney General in the Department of Justice (DOJ), to seek a court order to compel testimony of a witness appearing in court proceedings or before the grand jury. Additional information regarding the approval process is set forth in USAM 9-23.130, below, and the Criminal Resource Manual at 720.

9-23.130 Approval by Assistant Attorney General to Compel Testimony

The Attorney General has designated the Assistant Attorneys General and Deputy Assistant Attorneys General of the Criminal, Antitrust, Civil, Civil Rights, Environmental and Natural Resources, and Tax Divisions

to review (and approve or deny) requests for immunity (*viz.*, authorization to seek compulsion orders) in matters assigned to their respective divisions (28 C.F.R. Sec. 0.175), although this approval is still subject to Criminal Division clearance. This authority extends to requests for immunity from administrative agencies under 18 U.S.C. § 6004. This delegation also applies to the power of the Attorney General under 18 U.S.C. § 6005 to apply to the district court to defer the issuance of an order compelling the testimony of a witness in a congressional proceeding.

NOTE: All requests for immunity, including those whose subject matter is assigned to a Division other than the Criminal Division, must be submitted to the Criminal Division, and no approval may be granted unless the Criminal Division indicates that it has no objection to the proposed grant of immunity (28 C.F.R. Sec. 0.175).

Requests for authorization to seek to compel testimony should be processed as described in the Criminal Resource Manual at 720, using the form contained in the Criminal Resource Manual at 721.

Additional information regarding the steps to follow once authorization has been granted to seek to compel testimony is available in the Criminal Resource Manual

Obtaining the Court Order	Criminal Resource Manual at 723
Expiration of Authority to Compel	Criminal Resource Manual at 724
Use of Immunized Testimony by Sentencing Court	Criminal Resource Manual at 725
Steps to Avoid Taint	Criminal Resource Manual at 726
Civil Contempt	Criminal Resource Manual at 727
Criminal Contempt	Criminal Resource Manual at 728

9-23.140 Authority to Initiate Immunity Requests

Assistant United States Attorneys, with the approval of the United States Attorney or, in his or her absence, a supervisory Assistant United States Attorney, and Department attorneys, with the approval of an appropriate Assistant Attorney General or Deputy Assistant Attorney General of DOJ, may initiate requests to compel testimony under the use immunity statute.

9-23.210 Decision to Request Immunity -- The Public Interest

Section 6003(b) of Title 18, United States Code, authorizes a United States Attorney to request immunity when, in his/her judgment, the testimony or other information that is expected to be obtained from the witness "may be necessary to the public interest." Some of the factors that should be weighed in making this judgment include:

- A. The importance of the investigation or prosecution to effective enforcement of the criminal laws;
- B. The value of the person's testimony or information to the investigation or prosecution;
- C. The likelihood of prompt and full compliance with a compulsion order, and the effectiveness of available sanctions if there is no such compliance;
- D. The person's relative culpability in connection with the offense or offenses being investigated or prosecuted, and his or her criminal history;
- E. The possibility of successfully prosecuting the person prior to compelling his or her testimony;
- F. The likelihood of adverse collateral consequences to the person if he or she testifies under a compulsion order.

These factors are not intended to be all-inclusive or to require a particular decision in a particular case. They are, however, representative of the kinds of factors that should be considered when deciding whether to seek immunity.

9-23.211 Decision to Request Immunity -- Close-Family Exception

When determining whether to request immunity for a witness, consideration should be given to whether the witness is a close family relative of the person against whom the testimony is sought. A close family relative is a spouse, parent, child, grandparent, grandchild or sibling of the witness. Absent specific justification, the Department will ordinarily avoid seeking to compel the testimony of a witness who is a close family relative of the defendant on trial or of the person upon whose conduct grand jury scrutiny is focusing. Such specific justification exists, among other circumstances, where (i) the witness and the relative participated in a common business enterprise and the testimony to be elicited relates to that enterprise or its activities; (ii) the testimony to be elicited relates to illegal conduct in which there is reason to believe that both the witness and the relative were active participants; or (iii) testimony to be elicited relates to a crime involving overriding prosecutorial concerns.

9-23.212 Decision to Request Immunity -- Conviction Prior to Compulsion

It is preferable as a matter of policy to punish offenders for their criminal conduct prior to compelling them to testify. While this is not feasible in all cases, a successful prosecution of the witness, or obtaining a plea of guilty to at least some of the charges against the witness, will avoid or mitigate arguments of co-defendants made to the court or jury that the witness "cut a deal" with the government to avoid the witness's own conviction and punishment.

9-23.214 Granting Immunity to Compel Testimony on Behalf of a Defendant

As a matter of policy, 18 U.S.C. § 6002 will not be used to compel the production of testimony or other information on behalf of a defendant except in extraordinary circumstances where the defendant plainly would be deprived of a fair trial without such testimony or other information. This policy is not intended to preclude compelling a defense witness to testify if the prosecutor believes that to do so is necessary to a successful prosecution.

9-23.250 Immunity for the Act of Producing Records

The Supreme Court has interpreted the Fifth Amendment privilege against self-incrimination to include the act of producing business records of a sole proprietorship. *United States v. Doe*, 465 U.S. 605 (1984). The act of producing records concedes the existence and possession of the records called for by the subpoena as well as the respondent's belief that such records are those described in the subpoena. Requests for immunity for the limited purpose of obtaining records pursuant to *Doe* should clearly state this fact in the application.

The same letter of authority is issued by DOJ for the production of records as for testimony. *See* the Criminal Resource Manual at 722 (Letter of Authority). Therefore, prosecutors should draft the court order to clearly limit the grant of immunity to the act of producing records pursuant to *Doe, supra*.

9-23.400 Authorization to Prosecute after Compulsion

After a person has testified or provided information pursuant to a compulsion order--except in the case of act-of-production immunity--an attorney for the government shall not initiate or recommend prosecution of the person for an offense or offenses first disclosed in, or closely related to, such testimony or information without the express written authorization of the Attorney General. Such requests for authorization should be sent to the Assistant Attorney General for the division that issued the letter of authority for requesting the original compulsion order.

The request to prosecute should indicate the circumstances justifying prosecution and the method by which the government will be able to establish that the evidence it will use against the witness will meet the government's burden under *Kastigar v. United States*, 406 U.S. 441 (1972).